No. L. 5316—*Ml.* 74-37-17, *dated Bangalore, the 14th December* 1937.

Under sub-section (4) of Section 228 of the Mysore City Municipalities Regulation, 1933, the following draft of the rules which the Government propose to make under Section 23 (2) (b) of the said Regulation, amending the existing rules regulating the election of the President and Vice-President of a City Municipal Council issued under Government Order No. L. 3957—Ml. 56-21-14, dated 26th November 1924, is published for general information. Any objections or suggestions may be sent for consideration before 31st December 1937 :—

Add the following as sub-rule (d) to Rule 1, the present sub-rule (d) being re-numbered as (e) :—

1. "(*d*) When an elected President or Vice-President vacates Office on the expiry of the term limited to one year under proviso to Section 23 (12), at a meeting of the Council held not later than one month from the date of occurrence of the vacancy."

2. In the proviso to Rule (1), omit the words "during the said period of one or two months as the case may be."

By Order,

P. H. KRISHNA RAO,

Secretary to Government,

Local Self-Government Department.

No. 2824—*L. C., Bangalore dated 9th December* 1937.

Under Rule 8 of the rules for the conduct of business of the Mysore Legislative Council, the accompanying Bill further to amend the Mysore Limitation Regulation, 1911, is published for general information with the statement of objects and reascns.

By Order,

A. SUNDARARAJA RAO,
Secretary,
Mysore Legislative Council.

Bill further to amend the Mysore Limitation Regulation, 1911.

Whereas it is expedient further to amend the Mysore Limitation Regulation, 1911; it is hereby enacted as follows:—

Short title and commencement.

1. (1) This Regulation may be called the Mysore Limitation (Amendment) Regulation, 193 .

(2) It shall come into force on the first day of

Amendment of Section 5.

2. In section 5 of the Mysore Limitation Regulation, 1911 (hereinafter referred to as the said Regulation), for the words "by any enactment or rule" the words "by or under any enactment" shall be substituted.

Amendment of section 10.

3. In section 10 of the said Regulation, the following paragraph shall be inserted, namely:—

"For the purposes of this section any property comprised in a Hindu, Mahomedan or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose and the manager of any such property shall be deemed to be the trustee thereof."

Amendment of Section 29.

4. For section 29 of the said Regulation, the following shall be substituted, namely:—

"29 (1) Nothing in this Regulation shall affect section 25 of the Indian Contract Act, 1872, as in force in Mysore;

(2) where any special or local law prescribes for any suit, appeal or application a period of limitation

different from the period prescribed therefor by the First Schedule, the provisions of section 3 shall apply, as if such period were prescribed therefor in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law,

(*a*) the provisions contained in section 4, sections 9 to 18, and section 22 shall apply only in so far as and to the extent to which, they are not expressly excluded by such special or local law ; and

(*b*) the remaining provisions of this Regulation shall not apply."

Addition of Articles 48-A and 48-B.

5. In the first division of the First Schedule to the said Regulation, after Article 48, the following articles shall be inserted, namely :—

48-A. To recover movable property conveyed or bequeathed in trust, deposited or pawned, and afterwards bought from the trustee, depository or pawnee for a valuable consideration.	Three years	When the sale becomes known to the plaintiff.
48-B. To set aside sale of movable property comprised in a Hindu, Mahomedan or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Three years	When the sale becomes known to the plaintiff.

Amendment of Art. 132.

6. To Article 132 in the First Division of the First Schedule to the said Regulation, the following explanation shall be added, namely :—

"*Explanation.*—Advances secured by mortgage by deposit of title deeds shall, for the purposes of this article, be deemed to be money charged upon immovable property."

Amendment of First Schedule.

7. In the First Division of the First Schedule to the said Regulation :—

(*a*) Article 133 shall be omitted.

(*b*) In Article 134, in the third column, for the words "The date of the transfer" the words "when the transfer becomes known to the plaintiff" shall be substituted ; and

(*c*) After Article 134, the following articles shall be inserted, namely :—

134-A. To set aside a transfer of immovable property comprised in a Hindu, Mahomedan or Buddhist religious or charitable endowment made by a manager thereof for a valuable consideration.	Twelve years.	When the transfer becomes known to the plaintiff.
134-B. By the manager of a Hindu, Mahomedan or Buddhist religious or charitable endowment, to recover possession of immovable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.	Twelve years	The death, resignation or removal of the transferor
134-C. By the manager of a Hindu, Mahomedan or Buddhist religious or charitable endowment to recover possession of movable property comprised in the endowment which has been sold by a previous manager for a valuable consideration.	Twelve years	The death, resignation or removal of the seller.

Amendment of Art. 158.

8. In the Third Division of the First Schedule to the said Regulation, in Article 158 in the third column, for the words "when the award is submitted to the court," the words "when the award is filed in court and notice of the filing has been given to the parties" shall be substituted.

Amendment of Art. 166.

9. In the Third Division of the First Schedule to the said Regulation in Article 166 in the first column, the words "or fraud" shall be inserted after the word "irregularity."

Amendment of Arts. 176, 177 and 178.

10. In the Third Division of the First Schedule of the said Regulation, (*a*) in Articles 176 and 177 in the second column for the word "ditto" appearing against each article the words "Ninety days" shall be substituted; and (*b*) in Article 178 in the second column for the word "Ditto" the words "six months" shall be substituted.

Statement of Objects and Reasons.

In the judgment of the High Court in Motiram Lala *vs.* Deputy Commissioner and Muzrai Officer, Mysore

District (40 Mys. H. C. R. 330), it was suggested that section 29 of the Limitation Regulation may be amended as in British India so as to make most of the exceptions and qualifications to section 3 of the Limitation Regulation apply not only to the periods of limitation prescribed by that Regulation but to periods of limitation prescribed by other Regulations. Before the amendment in British India in 1922, section 29 was the same as here. It provided that nothing in the Limitation Act shall affect or alter any period of limitation specially prescribed for any suit, appeal or applications by any special or local law. The interpretation of this provision was the subject of conflicting decisions by High Courts, some holding that the application of the general provisions of Limitation Act would be to affect the period of limitation prescribed under the special law and others holding a contrary view. To remove this conflict, section 29 of the British Indian Act was amended by Act X of 1922. As suggested by the High Court in the judgment cited above, it is proposed to amend section 29 of the Mysore Regulation as in British India (*Vide* clause 4). While amending section 29 opportunity is taken to bring the Mysore Regulation into line with the Act in British India so far as it is suitable.

The chief of such amendments are explained below :—

Clause 2.—The change is verbal and better expresses the intention of the section.

Clause 3.—Recent decisions of courts have taken the view that whenever property is conveyed to a religious or charitable institution, it is not held by the manager thereof as trustee. He holds it only as manager and the property does not vest in him in trust, with the result that suits against him in respect of the property of the endowments of this nature are not governed by section 10 of the Limitation Regulation. Section 10 is therefore amended so as to put property of Hindu and Mahomedan religious endowments on the same footing as other trust property which definitely vest in a trustee.

Clause 5.—The provisions of Article 133 are enacted as Article 48-A with the period of limitation curtailed to three years. Specific provision is made by Article 48-B for the case of a suit to set aside sales of movable property comprised in a religious or charitable endowment where the plaintiff is merely interested in the endowment as a

beneficiary, but is not entitled to possession. The date when the plaintiff obtains knowledge of the sale he seeks to attack is the most suitable date from which limitation should run. If limitation runs from the date of purchase or even from the date of delivery of possession, a dishonest trustee and a collusive transferee might conceal the fact until the period of limitation expires. With this change it is considered that a period of three years in the case of movable property is quite sufficient.

Clause 6.—As it is not definite what period of limitation should govern a suit to recover money due on a mortgage by the deposit of title deeds, provision is now made therefor by fixing a period of 12 years in such cases.

Clause 7.—The notes to clause 5 explain the reason for deleting Article 133 which is enacted as Article 48-A. As the manager of a religious or charitable institution is not a trustee, Articles 133 and 134 as they stand would not be applicable to such institutions. This would also be in consonance with Order XXI, Rule 90 of C. P. C. in which an application to set aside a sale on the ground of fraud is placed on the same footing as an application to set aside a sale on the ground of material irregularity. It is proposed to bring religious or charitable endowments within the scope of the principle of Articles 133 and 134. Suits by persons interested in the endowment to set aside alienations made by the manager are provided for in Article 48 B in respect of movable property, and in Article 134-A for immovable property. In the case of suits by the manager himself attacking transfers made by a predecessor for valuable consideration and claiming to recover the property, provision is made by special Articles 134-B and 134-C. For reasons stated in the notes to clause 5, the starting point in Articles 134 and 134-A is proposed to be taken as the date of the plaintiff's knowledge of the transfer. It is also proposed to take as the starting point for Articles 134-B and 134-C the death, resignation or removal of the transferring manager. The period of limitation of 12 years which is normal in all similar cases is adopted for Articles 134-A, 145-B and 134-C.

Clause 8.—Reading Article 158 along with paragraph 10, Second Schedule, C. P. C., it is desirable to make it definite that time will run from the day on which the parties receive notice that the award has been filed in court.

Clause 9.—In interpreting this article, decisions are not uniform whether fraud in publishing or conducting a sale would come within the scope of this article or not. It is proposed to make it clear that an application to set aside a sale on the ground of fraud in publishing or conducting a sale is governed by Article 166.

Clause 10.—The time now allowed to bring the legal representative of a deceased party on record is six months. This is considered too long and it is proposed to reduce it to ninety days. This will help in reducing the delay in the disposal of suits. The reduction will not affect parties who are diligent. The apprehension that the change will prove a hardship to parties who will find it difficult to ascertain the address of the legal representatives, has no force. What is required is that an application mentioning the legal representative should be filed in court. Delay in the service of summons owing to difficulty in ascertaining the address is sufficiently protected under the Civil Procedure Code.

No. 2825—*L. C., Bangalore dated 9th December* 1937.

Under Rule 8 of the rules for the conduct of business of the Mysore Legislative Council, the accompanying Bill to amend the Transfer of Property Regulation for certain purposes is published for general information with the statement of objects and reasons.

By Order,

A. SUNDARARAJA RAO,
Secretary,
Mysore Legislative Council.

Bill to amend the Transfer of Property Regulation for certain purposes.

Whereas it is expedient to amend the Transfer of Property Regulation, 1918, for the purposes hereinafter appearing; it is hereby enacted as follows:—

Short title and commencement.

1. (1) This Regulation may be called the Transfer of Property (Amendment) Regulation, 193 .

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(2) It shall come into force on the first day of .....

2. In section 3 of the Transfer of Property Regulation (hereinafter referred to as the said Regulation), for the last paragraph containing the definition of "notice," the following shall be substituted, namely :— Amendment of section 3.

"a person is said to have notice" of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it.

Explanation I.—Where any transaction relating to immovable property is required by law to be and has been effected by a registered instrument, any person acquiring such property or any part of or share or interest in, such property shall be deemed to have notice of such instrument as from the date of registration or, if the instrument has been registered under sub-section (2) of section 30 of the Mysore Registration Regulation, 1903, from the earliest date on which a memorandum there of has been filed by any Sub-Registrar under section 66 of that Regulation:

Provided that—

(1) the instrument has been registered and its registration completed in the manner prescribed by the Mysore Registration Regulation, 1903, and the rules made thereunder,

(2) the instrument has been duly entered or filed, as the case may be, in the books kept under section 51 of that Regulation, and

(3) the particulars regarding the transaction to which the instrument relates have been correctly entered in the indexes kept under section 55 of that Regulation.

Explanation II.—Any person acquiring any immovable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.

Explanation III.—A person shall be deemed to have had notice of any fact if his agent acquires notice thereof whilst acting on his behalf in the course of business to which that fact is material :

Provided that, if the agent fraudulently conceals the fact, the principal shall not be charged with notice

thereof as against any person who was a party to or otherwise cognizant of the fraud."

Amendment of section 5.

3. In section 5 of the said Regulation, after the words "*or to himself*" the words "*or to himself*" shall be inserted; and to the same section the following paragraph shall be added, namely:

"In this section 'living person' includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals."

Amendment of section 6.

4. In section 6 of the said Regulation, after clause (*d*) the following clause shall be inserted, namely:—

"(dd) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred."

Amendment of section 11.

5. For the second paragraph of section 11 of the said Regulation beginning with the words "nothing in this section" and ending with the words "in a particular manner" the following shall be substituted, namely:—

"Where any such direction has been made in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof."

Amendment of section 15.

6. In section 15 of the said Regulation, for the words "as regards the whole class," the following words shall be substituted, namely:—

"in regard to those persons only and not in regard to the whole class."

Substitution of new sections for sections 16, 17 and 18.

7. For sections 16, 17 and 18 of the said Regulation, the following sections shall be substituted, namely:—

Transfer to take effect on failure of prior interest.

"16. Where by reason of any of the rules contained in sections 13 and 14, an interest created for the benefit of a person or of a class of persons fails in regard to such person or the whole of such class, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.

Direction for accumulation.

"17. (1) Where the terms of a transfer of property direct that the income arising from the property shall be accumulated either wholly or in part during a period longer than—

(*a*) the life of the transferor, or

(*b*) a period of eighteen years from the date of the transfer,

such direction shall, save as hereinafter provided, be void to the extent to which the period during which the accumulation is directed exceeds the longer of the aforesaid periods, and at the end of such last-mentioned period the property and the income thereof shall be disposed of as if the period during which the accumulation has been directed to be made had elapsed.

(2) This section shall not affect any direction for accumulation for the purpose of—

(i) the payment of the debts of the transferor or any other person taking any interest under the transfer, or

(ii) the provision of portions for children or remoter issue of the transferor or of any other person taking any interest under the transfer, or

(iii) the preservation or maintenance of the property transferred;

and such direction may be made accordingly.

Transfer in perpetuity for benefit of public.

"18. The restrictions in sections 14, 16 and 17 shall not apply in the case of a transfer of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind."

Amendment of section 39.

8. In section 39 of the said Regulation—

(*a*) the words "with the intention of defeating such right" shall be omitted, and for the words "of such intention" the word "thereof" shall be substituted; and

(*b*) the *illustration* shall be omitted.

Amendment of section 40.

9. In section 40 of the said Regulation for the words "of the latter property or to compel its enjoyment in a particular manner," the words "in a particular manner of the latter property" shall be substituted.

Amendment of section 43.

10. In section 43 of the said Regulation, after the word "person" the words "fraudulently or" shall be inserted.

Amendment of section 52.

11. (1) In section 52 of the said Regulation—

(*a*) for the words "active prosecution" the word "pendency" shall be substituted;

(*b*) for the words "a contentious" the word "any" shall be substituted; and

(*c*) after the words "suit or proceeding," where they occur for the first time, the words "which is not collusive and" shall be inserted.

(2) To the same section the following *Explanation* shall be added, namely :—

"*Explanation.*—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

Substitution of new section for section 53.

Fraudulent transfer.

12. For section 53 of the said Regulation, the following section shall be substituted, namely :—

"53. (1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of, all the creditors.

(2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub-section, no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made."

Insertion of new section 53-A.

13. After section 53 of the said Regulation, the following section shall be inserted, namely :—

Part Performance.

"53-A. Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty,

and the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract,

and the transferee has performed or is willing to perform his part of the contract,

then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract;

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

Amendment of section 55.

14. In section 55 of the said Regulation—

(*a*) in sub-clause (a) of clause (1), after the word "property" the words "or in the seller's title thereto" shall be inserted;

(*b*) in sub-clause (b) of clause (4), after the word "buyer," where it occurs for the second time, the words "any transferee without consideration or any transferee with notice of the non-payment," shall be inserted; and after the words "on such amount or part" the words "from the date on which possession has been delivered" shall be added; and

(c) in sub-clause (b) of clause (6), the words "with notice of the payment" shall be omitted.

Substitution of new section for section 56.

15. For section 56 of the said Regulation, the following shall be substituted, namely :—

Marshalling by subsequent purchaser.

"56. If the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person, the buyer is, in the absence of a contract to the contrary, entitled to have the mortgage-debt satisfied out of the property or properties not sold to him, so far as the same will extend, but not so far as to prejudice the rights of the mortgagee or persons claiming under him or of any other person who has for consideration acquired an interest in any of the properties."

Amendment of section 58.

16. In section 58 of the said Regulation, (a) to clause (c) the following proviso shall be added, namely :—

"Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document which effects or purports to effect the sale;"

(b) in clause (d)—

(i) after the words "Where the mortgagor delivers possession" the words "or expressly or by implication binds himself to deliver possession" shall be inserted;

(ii) for the words "and to appropriate them" the words "or any part of such rents and profits and to appropriate the same" shall be substituted; and

(iii) after the words "or partly in lieu of interest," for the word "and" the word "or" shall be substituted; and

(c) after clause (e) the following clauses shall be added, namely :—

"(f) The transaction is called a mortgage by deposit of title deeds where a person, in any area to which this provision may be extended by the Government by notification in the Official Gazette, delivers to a Bank or its authorized agent documents of title relating to immovable property with intent to create a security thereon and accompanied by a memorandum in writing signed by the debtor specifying such property and the amount of credit given or agreed to be given by the Bank on the security

of such property, provided that a copy of such memorandum under the seal of the Bank and the signature of its authorised agent is delivered or transmitted by registered post within ten days of the delivery to the bank as aforesaid of the memorandum, to every registering officer within whose district or sub-district the whole or any portion of such property is situated, or where a special registering officer is appointed or designated by Government in this behalf, to such registering officer and such registering officer shall thereupon file the copy in his Book No. 1.

Explanation.—"Bank" in this clause means an association or company with limited liability formed principally for the purpose of engaging on the business of banking and registered under the provisions of the law relating to companies for the time being in force in Mysore or in British India or in any other Indian State which may be notified by the Government in the Official Gazette in this behalf.

(*g*) A mortgage which is not a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, an English mortgage or a mortgage by deposit of title-deeds within the meaning of this section is called an anomalous mortgage."

Amendment of section 59.

17. In section 59 of the said Regulation—

(*a*) after the words "a mortgage" the words "other than a mortgage by deposit of title deeds" shall be inserted and

(*b*) the second paragraph and the *Explanation* shall be omitted.

Insertion of new section 59-A.

18. After section 59 of the said Regulation, the following section shall be inserted, namely :—

References to mortgagors and mortgagees to include persons deriving title from them.

"59-A. Unless otherwise expressly provided, reference in this Chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively."

Amendment of section 60.

19. In section 60 of the said Regulation,

(*a*) for the word "payable" the word "due" shall be substituted;

(*b*) for the words "the mortgage-deed, if any, to the mortgagor" the following words shall be substituted, namely :—

"to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee;"

(*c*) for the word "order" the word "decree" shall be substituted; and

(*d*) after the words "remaining due on the mortgage, except" the word "only" shall be inserted.

Insertion of new sections 60-A and 60-B.

20. After section 60 of the said Regulation, the following sections shall be inserted, namely :—

Obligation to transfer to third party instead of re-transference to mortgagor.

"60-A. (1) Where a mortgagor is entitled to redemption, then, on the fulfilment of any conditions on the fulfilment of which he would be entitled to require a re-transfer, he may require the mortgagee, instead of re-transferring the property, to assign the mortgage-debt and transfer the mortgaged property to such third person as the mortgagor may direct; and the mortgagee shall be bound to assign and transfer accordingly.

(2) The rights conferred by this section belong to and may be enforced by the mortgagor or by any encumbrancer notwithstanding an intermediate encumbrance, but the requisition of any encumbrancer shall prevail over a requisition of the mortgagor and, as between encumbrancers the requisition of a prior encumbrancer shall prevail over that of a subsequent encumbrancer.

(3) The provisions of this section do not apply in the case of a mortgagee who is or has been in possession.

Right to inspection and production of documents.

60-B. A mortgagor, as long as his right of redemption subsists, shall be entitled at all reasonable times, at his request and at his own cost and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of, or extracts from, documents of title relating to the mortgaged property which are in the custody or power of the mortgagee."

Substitution of new section for section 61.

21. For section 61 of the said Regulation the following section shall be substituted, namely :—

Right to redeem separately or simultaneously.

"61. A mortgagor who has executed two or more mortgages in favour of the same mortgagee shall, in the absence of a contract to the contrary when the principal money of any two or more of the mortgages has become due, be entitled to redeem any one such mortgage

separately, or any two or more of such mortgages together."

Amendment of section 62.

22. In section 62 of the said Regulation—

(*a*) after the word "property," where it first occurs, the words "together with the mortgage deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee" shall be inserted;

(*b*) for the words "the interest of the principal money" the words "or any part thereof a part only of the mortgage money," shall be substituted; and

(*c*) for the words "the principal money," where they occur for the second time, the words "the mortgage-money or the balance thereof" shall be substituted.

Amendment of section 63.

23. In section 63 of the said Regulation, for the words "at the same rate of interest" the words "with interest at the same rate as is payable on the principal, or where no such rate is fixed, at the rate of nine per cent per annum" shall be substituted.

Insertion of new section 63-A.

24. After section 63 of the said Regulation, the following section shall be inserted, namely:—

Improvements to mortgaged property.

"63-A. (1) Where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, been improved, the mortgagor, upon redemption, shall, in the absence of a contract to the contrary, be entitled to the improvement; and the mortgagor shall not, save only in cases provided for in sub-section (2), be liable to pay the cost thereof.

(2) Where any such improvement was effected at the cost of the mortgagee and was necessary to preserve the property from destruction or deterioration or was necessary to prevent the security from becoming insufficient, or was made in compliance with the lawful order of any public servant or public authority, the mortgagor shall, in the absence of a contract to the contrary, be liable to pay the proper cost thereof as an addition to the principal money with interest at the same rate as is payable on the principal, or where no such rate is fixed, at the rate of nine per cent per annum, and the profits, if any, accruing by reason of the improvement shall be credited to the mortgagor.

(3) Notwithstanding anything in sub-section (1) a mortgagee may remove at any time whilst he is in possession of the property mortgaged, but not afterwards, all

things which he has attached to the earth, provided he leaves the property in the state in which he received it."

Amendment of section 64.

25. In section 64 of the said Regulation, the words "for a term of years" shall be omitted.

Amendment of section 65.

26. In section 65 of the said Regulation—

(*a*) in clause (d), the words "for a term of years" shall be omitted; and

(*b*) the words "Nothing in clause (c), or in clause (d), so far as it relates to the payment of future rent, applies in the case of an usufructuary mortgage" shall be omitted.

Insertion of new section 65 A.

27. After section 65 of the said Regulation, the following section shall be inserted, namely:—

Mortgagor's power to lease.

65-A. (1) Subject to the provisions of sub-section (2) a mortgagor, while lawfully in possession of the mortgaged property, shall have power to make leases thereof which shall be binding on the mortgagee.

(2) (*a*) Every such lease shall be such as would be made in the ordinary course of management of the property concerned, and in accordance with any local law, custom or usage.

(*b*) Every such lease shall reserve the best rent that can reasonably be obtained, and no premium shall be paid or promised and no rent shall be payable in advance.

(*c*) No such lease shall contain a covenant for renewal.

(*d*) Every such lease shall take effect from a date not later than six months from the date on which it is made.

(*e*) In the case of a lease of buildings, whether leased with or without the land on which they stand, the duration of the lease shall in no case exceed three years and the lease shall contain a covenant for payment of the rent and a condition of re-entry on the rent not being paid within a time therein specified.

(3) The provisions of sub-section (1) apply only if and as far as a contrary intention is not expressed in the mortgage-deed; and the provisions of sub-section (2) may be varied or extended by the mortgage-deed, and as so varied and extended, shall, as far as may be, operate in like manner and with all like incidents, effects and consequences, as if such variations or extensions were contained in that sub-section."

28. In section 67 of the said Regulation,— Amendment of section 67.

(*a*) for the word "payable" the word "due" shall be substituted;

(*b*) for the words "an order," wherever they occur, the words "a decree" shall be substituted; and

(*c*) for clause (*a*) the following clause shall be substituted, namely :—

"(*a*) to authorize any mortgagee, other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or an usufructuary mortgagee as such, where he is authorized to appropriate the rents and profits or any part of such grants and profits in payment of the principal money or partly in lieu of interest or partly in payment of the principal money, or a mortgagee by conditional sale as such to institute a suit for sale; or."

29. After section 67 of the said Regulation, the following section shall be inserted, namely :— Insertion of new section 67A.

"67A. A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right ro obtain the same kind of decree under section 67, and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage-money has become due." Mortgagee when bound to bring one suit on several mortgages.

30. For section 68 of the said Regulation, the following section shall be substituted, namely :— Substitution of new section for section 68.

"68. (1) The mortgagee has a right to sue for the mortgage money in the following cases and no others, namely :— Right to sue for mortgage money.

(*a*) where the mortgagor binds himself to repay the same;

(*b*) where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed or the security is rendered insufficient within the meaning of section 66, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so;

(*c*) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor;

(*d*) where, the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him, or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor;

Provided that, in the case referred to in clause (*a*), a transferee from the mortgagor or from his legal representative shall not be liable to be sued for the mortgage-money.

(2) Where a suit is brought under clause (*a*) or clause (*b*) of sub-section (1), the Court may, at its discretion, stay the suit and all proceedings therein, notwithstanding any contract to the contrary, until the mortgagee has exhausted all his available remedies against the mortgaged property or what remains of it, unless the mortgagee abandons his security and, if necessary, re-transfers the mortgaged property."

Amendment of section 71.

31. In section 71 of the said Regulation, the words "for a term of years" shall be omitted.

Amendment of section 72.

32. In section 72 of the said Regulation:—

(*a*) for the words "When, during the continuance of the mortgage, the mortgagee takes possession of the mortgaged property, he" the words "A mortgagee" shall be substituted.

(*b*) clause (*a*) shall be omitted;

(*c*) in clause (*b*), for the words "its preservation" the words "the preservation of the mortgaged property" shall be substituted;

(*d*) after the words "nine per cent per annum," the following Proviso shall be inserted, namely:—

"Provided that the expenditure of money by the mortgagee under clause (*b*) or clause (*c*) shall not be deemed to be necessary unless the mortgagor has been called upon and has failed to take proper and timely steps to preserve the property or to support the title." and

(*e*) for the words "a charge on the mortgaged property, in addition to the principal money, with the same priority and with interst at the

same rate" the following shall be substituted, namely :—

"added to the principal money with interest at the same rate as is payable on the principal money, or, where no such rate is fixed, at the rate of nine per cent, per annum."

Substitution of new section for section 73.

33. For section 73 of the said Regulation, the following section shall be substituted, namely :—

"73. (1) Where the mortgaged property or any part thereof or any interest therein is sold owing to failure to pay arrears of revenue or other charges of a public nature or rent due in respect of such property, and such failure did not arise from any default of the mortgagee, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of any surplus of the sale proceeds remaining after payment of the arrears and of all charges and deductions directed by law.

(2) Where the mortgaged property or any part thereof or any interest therein is acquired under the Land Acquisition Regulation, 1894, or any other enactment for the time being in force providing for the compulsory acquisition of immovable property, the mortgagee shall be entitled to claim payment of the mortgage-money, in whole or in part, out of the amount due to the mortgagor as compensation,

(3) Such claims shall prevail against all other claims except those of prior encumbrances, and may be enforced notwithstanding that the principal money on the mortgage has not become due."

Omission of sections 74 and 75.

34. Section 74 and section 75 of the said Regulation shall be omitted.

Amendment of section 76.

35. In section 76 of the said Regulation :—

(*a*) in clause (*c*), after the words "charges of a public nature" the words "and all rent" shall be inserted;

(*b*) in clause (*h*), after the words "deducting the expenses" the words "properly incurred for the management of the property and the collection of rents and profits and the other expenses" shall be inserted, and the words "on the principal-money" shall be omitted; and

(*c*) in clause (*i*), the word "gross" shall be omitted.

Omission of section 80.

36. Section 80 of the said Regulation shall be omitted.

Substitution of new section for section 81.

37. For sub-section (i) of section 81 of the said Regulation, the following section shall be substituted, namely :—

"81. (1) If the owner of two or more properties mortgages them to one person and then mortgages one or more of the properties to another person, the subsequent mortgagee is, in the absence of a contract to the contrary, entitled to have the prior mortgage-debt satisifed out of the property or properties not mortgaged to him, so far as the same will extend, but not so as to prejudice the rights of the prior mortgagee or of any other person who has for consideration acquired an interest in any of the properties."

Amendment of section 82.

38. In section 82 of the said Regulation :—

(*a*) for the first paragraph beginning with the words "Where several properties," and ending with the words "date of the mortgage" the following shall be substituted, namely :—

"Where property subject to a mortgage belongs to two or more persons having distinct and separate rights of ownership therein, the different shares in or parts of such property owned by such persons are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, and, for the purpose of determining the rate at which each such share or part shall contribute, the value thereof shall be deemed to be its value at the date of the mortgage after deduction of the amount of any other mortgage or charge to which it may have been subject on that date" and

(*b*) in the third paragraph, for the word "second" the word "subsequent" shall be substituted.

Amendment of section 83.

39. In section 83 of the said Regulation :—

(*a*) for the words "has become payable" the words "payable in respect of any mortgage has become due" shall be substituted ;

(*b*) for the words "if then in his possession or power" the words "and all documents in his possession or power relating to the mortgaged property" shall be substituted ;

(*c*) after the word "mortgage-deed," where it occurs for the second time, the words "and all such other documents" shall be inserted ; and

(*d*) the following paragraph shall be added after the words "such other person as aforesaid," namely :—

"Where the mortgagee is in possession of the mortgaged property, the Court shall, before paying to him the amount so deposited, direct him to deliver possession thereof to the mortgagor and at the cost of the mortgagor either to retransfer the mortgaged property to the mortgagor or to such third person as the mortgagor may direct or to execute and (where the mortgage has been effected by a registered instrument) have registered an acknowledgment in writing that any right in derogation of the mortgagor's interest transferred to the mortgagee has been extinguished."

Amendment of section 84.

40. In section 84 of the said Regulation :—

(*a*) after the words "from the date of the tender or" the words "in a case of a deposit, where no previous tender of such amount has been made," shall be inserted;

(*b*) for the words "as the case may be" the following shall be substituted, namely :—

"and the notice required by section 83 has been served on the mortgagee :

"Provided that, where the mortgagor has deposited such amount without having made a previous tender thereof and has subsequently withdrawn the same or any part thereof interest on the principal money shall be payable from the date of such withdrawal ;" and

(*c*) after the words "tender of the mortgage-money" the words "and such notice has not been given before the making of the tender or deposit, as the case may be" shall be added.

Substitution of new section for section 91.

41. For section 91 of the said Regulation the following section shall be substituted, namely :—

Persons who may sue for redemption.

"91. Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely :—

(*a*) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same ;

(*b*) any surety for the payment of the mortgage-debt or any part thereof; or

(*c*) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property."

Insertion of new sections 92, 93 and 94.

42. After section 91 of the said Regulation, the following sections shall be inserted, namely :—

Subrogation.

"92. Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee.

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems.

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated.

Nothing in this section shall be deemed to confer a right of subrogation on any person unless the mortgage in respect of which the right is claimed has been redeemed in full.

Prohibition of tacking.

93. No mortgagee paying off a prior mortgage, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his original security; and except in the case provided for by section 79, no mortgagee making a subsequent advance to the mortgagor, whether with or without notice of an intermediate mortgage, shall thereby acquire any priority in respect of his security for such subsequent advance.

Rights of mesne mortgagee.

94. Where a property is mortgaged for successive debts to successive mortgagees, a mesne mortgagee has the same rights against mortgagees posterior to himself as he has against the mortgagor."

Substitution of new sections for section 95.

43. For section 95 of the said Regulation the following sections shall be substituted, namely :—

"95. Where one of several mortgagors redeems the mortgaged property, he shall, in enforcing his right of subrogation under section 92 against his co-mortgagors, be entitled to add to the mortgage-money recoverable from them such proportion of the expenses properly incurred in such redemption as is attributable to their share in the property.

Right of redeeming co-mortgagor to expenses.

96. The provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds."

Mortgage by deposit of title-deeds.

44. In section 98 of the said Regulation, for the words "a mortgage not being a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage or an English mortgage or a combination of the first and third, or the second and third, of such forms," the words "an anomalous mortgage" shall be substituted.

Amendment of section 98.

45. In section 100 of the said Regulation,

Amendment of section 100.

(*a*) for the words "as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of sections 81 and 82 shall, so far as may be, apply to the person having such charge" the words "which apply to a simple mortgage shall, so far as may be, apply to such charge," shall be substituted; and

(*b*) after the words "in the execution of his trust" the following words shall be added, namely:—

"and save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge."

46. For section 101 of the said Regulation, the following section shall be substituted, namely:—

Substitution of new section for section 101.

"101. Any mortgagee of, or person having a charge upon immovable property, or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon, the same property; and no such subsequent mortgagee or charge-holder shall be entitled to foreclose or sell such property without redeeming the

No merger in case of subsequent encumbrance.

prior mortgage or charge, or otherwise than subject thereto."

Amendment of section 102

47. In section 102 of the said Regulation,

(*a*) for the words "Where the person or agent on whom such notice should be served cannot be found in the said district, or is unknown" the words "Where no person or agent on whom such notice should be served can be found or is known," shall be substituted;

(*b*) after the words "and any notice served in compliance with such direction shall be deemed sufficient" the following proviso shall be inserted, namely :—

"Provided that, in the case of a notice required by section 83, in the case of a deposit, the application shall be made to the court in which the deposit has been made."

(*c*) for the words "Where the person or agent to whom such tender should be made cannot be found within the said district, or is unknown" the words "Where no person or agent to whom such tender should be made can be found or is known," shall be substituted; and

(*d*) for the words "in such Court as last aforesaid" the words "in any Court in which a suit might be brought for redemption of the mortgaged property" shall be substituted.

Amendment of section 106.

48. In section 106 of the said Regulation, for the words "tendered or delivered either personally to the party who is intended to be bound by it," the following shall be substituted, namely .—

"either be sent by post to the party who is intended to be bound by it.or be tendered or delivered personally to such party."

Amendment of section 107.

49. In section 107 of the said Regulation, after the words "by delivery of possession", where they first occur, the following paragraph shall be inserted, namely :—

"Where a lease of immovable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee."

Amendment of section 108.

50. In section 108 of the said Regulation.—

(*a*) in clause (*h*)

(*i*) after the words "the lessee may" the words "even after the determination of the lease" shall be inserted; and

(*ii*) for the words "during the continuance of the lease," the words "whilst he is in possession of the property leased but not afterwards," shall be substituted; and

(*b*) in clause (*o*), after the words "or fell" the words "or sell" shall be inserted, and after the words "or damage buildings," the words "belonging to the lessor or" shall be inserted.

Amendment of section 111.

51. In clause (g) of section 111 of the said Regulation,—

(*a*) the words "or the lease shall become void" shall be omitted;

(*b*) after the words "title in himself" the following shall be inserted, namely:—

"or (3) the lessee is adjudicated an insolvent and the lease provides that the lessor may re-enter on the happening of such event";

(*c*) for the words "either case" the words "any of these cases" shall be substituted; and

(*d*) for the words "does some act showing" the words "give notice in writing to the lessee of" shall be substituted.

Insertion of new section 114 A.

52. After section 114 of the said Regulation, the following section shall be inserted, namely:—

Relief against forfeiture in certain other cases.

"114-A. Where a lease of immovable property has been determined by forfeiture for a breach of an express condition which provides that on breach thereof the lessor may re-enter, no suit for ejectment shall lie unless and until the lessor has served on the lessee a notice in writing—

(*a*) specifying the particular breach complained of; and

(*b*) if the breach is capable of remedy, requiring the lessee to remedy the breach;

and the lessee fails within a reasonable time from the date of the service of the notice, to remedy the breach, if it is capable of remedy.

Nothing in this section shall apply to an express condition against the assigning, under-letting, parting with the possession, or disposing of the property leased, or to an express condition relating to forfeiture in case of non-payment of rent."

Substitution of new section for section 119

53. For section 119 of the said Regulation, the following section shall be substituted, namely:—

Right of party deprived of thing received in exchange.

"119. If any party to an exchange or any person claiming through or under such party is by reason of any defect in the title of the other party deprived of the thing or any part of the thing received by him in exchange, then, unless a contrary intention appears from the terms of the exchange, such other party is liable to him or any person claiming through or under him for loss caused thereby, or at the option of the person so deprived, for the return of the thing transferred, if still in the possession of such other party or his legal representative or a transferee from him without consideration."

Amendment of section 128.

54. In section 128 of the said Regulation, after the words "debts due by" the words "and liabilities of" shall be inserted.

Amendment of section 130.

55. In section 130 of the said Regulation :—

after the words "The transfer of an amicable claim" the words "whether with or without consideration" shall be inserted.

Saving clause.

56. Nothing in any of the following provisions of this Regulation namely sections 2, 6, 7, 12, 15, 16, 24, 27, clause (c) of section 28, sections 29, 30, 41, 47, 49, 51, 52, 53 and 55 shall be deemed in any way to affect—

(a) the terms of incidents of any transfer of property made or effected before the first day of.....

(b) the validity, invalidity, effect or consequences of anything already done or suffered before the aforesaid date,

(c) any right, title, obligation or liability already acquired, accrued or incurred before such date, or

(d) any remedy or proceeding in respect of such right, title, obligation or liability and nothing in any other provision of this Regulation shall render invalid or in any way affect anything already done before the first day of.....in any proceeding pending in a Court on that date ; and any such remedy and any such proceeding as is herein referred to may be enforced, instituted or continued, as the case may be, as if this Regulation had not been passed.

Statement of Objects and Reasons.

The Transfer of Property Regulation in Mysore was passed in 1918 on the lines of the British Indian Act of 1882 and all amendments passed there up to 1918 were

taken into consideration. The British Indian Act has subsequently been amended largely by Act XX of 1929 which has made substantial changes in many sections and has set at rest points on which there have been conflicting decisions. It is considered desirable to adopt these amendments as some of them are beneficial and it is convenient not to have a law in this respect different from that in British India unless dictated by local conditions. A bill has accordingly been drafted.

In the bill it has been sought to remedy defects which have led to inconvenience or anomalous results and to incorporate new principles of importance which have been judicially recognised.

Special attention is, however, drawn to the following principles included in the bill :—

(1) Provision is made so that registration will amount to notice of the document registered :

(2) Constructive notice to an agent of a fact material to the course of business in which the agent is engaged will be notice of that fact to the principal. The agent must not have fraudulently concealed the fact from his principal :

(3) The validity of transfers in favour of a class, when some members of that class are unable to take, is recognised so that they may enure to the benefit of those members of the class who are capable of taking ;

(4) The doctrine of part performance is recognised. By this doctrine the transferee is protected where the contract to transfer is followed by part performance and the contract is made enforceable even though the contract is not registered. At the same time, care is taken to see that the law of registration is not evaded ;

(5) In a mortgage by conditional sale, the condition must be embodied in the same deed ;

(6) Provision is made to require the mortgagee to transfer, when so required, the mortgage debt to a third person named by the mortgagor ;

(7) It is made clear that the mortgagor has a right to inspect and take copies of the documents of title relating to the mortgaged property which are in the possession of the mortgagee ;

(8) It is also made clear that the mortgagor has the option to redeem several mortgages to the same mortgagee separately or simultaneously ;

(9) There is no express provision in the Regulation allowing a mortgagee to make necessary improvements to the mortgaged property. This is now provided for:

(10) Statutory recognition is given to the mortgagor's power to lease so as to bind the mortgagee subject to certain safeguards;

(11) Remedy of foreclosure is abolished in the case of all mortgages except a mortgage by conditional sale or an anamolous mortgage providing expressly for foreclosure;

(12) Mortgagee is obliged to enforce several mortgages by the same mortgagor simultaneously in the absence of contract to the contrary;

(13) Provision is made for the court to stay a suit for enforcing the personal remedy against the mortgagor till the mortgagee has exhausted his remedies against the mortgaged property;

(14) The principle of subrogation is extended so that all persons who have an interest in the mortgaged property except the mortgagor will be entitled to be substituted in the place of the creditor who is paid off;

(15) The law of merger is modified so that the creditor may have the benefit of keeping his own incumbrance as well as those which he has paid off alive against subsequent incumbrances;

(16) Leases will be required to be executed by both parties.

Notes on Clauses.

Clause 2.—Notice as defined in section 3 includes both actual and constructive notice. This gave rise to a conflict of decisions in British India whether registration of a document is of itself constructive notice of the transaction effected by the document. Since the system of registration has been in existence in the State for over 70 years and is of general application, one of the objects for which instruments are required to be registered would be defeated if registration is to be held as not implying notice. Under the Transfer of Property Regulation most of the transfers of immovable property have to be effected by registered instruments and some few where property is of low value are allowed to be effected by delivery of possession. The means of search in registration offices are within the powers of a person taking a transfer. It is therefore desirable that express provision should be made in the Regulation itself making it clear that registration

of an instrument relating to immovable property amounts to notice of the instrument from the date of the instrument or from the date on which a memorandum of a registered instrument has been filed by a Sub-Registrar in whose jurisdiction a property is situated when it has been registered in another jurisdiction. This is provided for in Explanation I of the definition of "Notice."

Explanation II provides that the person dealing with any immovable property shall be deemed to have notice of the title of the person who for the time being is in actual possession. There was some uncertainty in regard to this. It does not seem reasonable that a person entering into a transaction relating to immovable property should ignore the question of possession or neglect to inquire into the title of the person in actual possession of such property. Notice in this case is not extended to possession which is merely of a constructive nature.

The last portion of the existing definition of notice which relates to notice through an agent is defective in as much as it may be construed as being restricted to cases of express notice. Explanation III amends the law as to notice to an agent by widening the definition so as to include a fact of which the agent has notice whether express or constructive. This is in accordance with the well-established principle that the agent stands in the place of his principal with reference to the business on hand so that his acts and knowledge are the acts and knowledge of his principal. If notice to the agent whether actual or constructive is not made notice to the principal, notice may be avoided in every case by employing agents. In the amendment there are safeguards to the effect that the notice must be of a fact which is material to the course of the business in which the agent is engaged, and that the agent must not fraudulently have concealed the fact from his principal.

Clause 3.—This provides for the case where a man makes a settlement of his property in trust and constitutes himself as a trustee. An explanation has been added to make it clear that the words "living person" include corporations and other associations of persons.

Clause 4.—A right to receive maintenance is a personal right and it is in accordance with public policy that these rights which are generally created for the maintenance or personal enjoyment of a qualified owner should

not be alienable. Hence a new clause is added to section 6. This does not apply to arrears of maintenance which have accrued due.

Clause 5.—Sections 11 and 40 of the Regulation refer to affirmative and negative covenants in a transfer. Section 11 refers to rights as between a transferor and a transferee while section 40 relates to the rights of third parties against transferees. The words "to compel its enjoyment" used in the second paragraph of section 11 and in the first paragraph of section 40 indicate that affirmative covenants for the beneficial enjoyment of one piece of the property of which the other piece has been transferred can in all cases be enforced and this is based on the principle in the English case of Tuck *VS* Moxhay. But later English decisions which have been followed in India made it clear that only covenants of a negative character and imposing no pecuniary obligatiou can be enforced under the rule in Tuck's case against purchasers from the transferee or covenantor. It is therefore proposed to amend the second paragraph of section 11 and the first paragraph of section 40 so as to make it clear that, although an affirmative covenant is not by itself invalid as between a transferor and a transferee (Section 11) negative or restrictive covenants only can be specifically enforced against a purchaser from a transferee.

Clause 6.—Section 15 is so amended as to make a gift to a class, some of whom are or may be incapacitated from taking, enure for the benefit of those members of the class who are capable of taking. This is in accordance with the tendency of decisions later than Leake *vs.* Robinson, the rule in which was embodied in present section 15.

Clause 7.—The amendment of section 15 renders a reference to that section in section 16 unnecessary. But provision is however made for the case where a transfer fails as to all the members of the class by reason of the rules in sections 13 and 14.

Section 18 relates to the rule against accumulations and allows accumulations for a period of one year only in certain cases. In England, the Thellusson Act allowed a much longer period. Even in India in cases which were not governed by section 18, the rule followed was that if there was nothing illegal or unreasonable in a direction to accumulate, such direction should be given effect to. It

is desirable to allow accumulations for longer periods to lay down definitely on the lines of the English law the periods and the objects for which a condition as to accumulation should be held valid. It is also desirable to accept certain well recognised exceptions in law such as those relating to provisions for the payment of debts, raising portions for children and the repairs to the property transferred. The restrictions contained in sections 14 and 16 and also the restrictions as to accumulations under section 18 should not apply to charities. section 18 dealing with accumulations should come after section 16 and it is numbered 17. The present section 17 which deals with charities is numbered 18.

Clause 8.—Section 39 now provides that a right to receive maintenance or a provision for advancement or marriage from the profits of immovable property can be enforced against the transferee if the transfer has been made with the intention of defeating the right and the transferee has notice of the intention. In actual practice it will be very difficult to adduce proof of mere intention. As it is desirable to protect persons entitled to maintenance or for whom provision for advancement has been made, it is necessary that the section be amended so that there may be no necessity to refer to the transferor's intention to defeat or for the transferee to be aware of such intention. As the illustration to the section is not consistent with the section as it does not make any reference to the intention of transferor, it is omitted.

Clause 9.—The amendment makes it clear that only negative or restrictive covenants can be specifically enforced against a third person as has been explained in the note to clause 5.

Clause 10.—This makes it clear that erroneous representation may either be innocent or tainted with fraud.

Clause 11.—The use of words "active prosecution" and "contentious" has given rise to difficulties in construing section 52. It has given room for a difference of view as to when a suit may be said to be in active prosecution and when it may be said to be contentious. The word "pendency" is therefore substituted for "active prosecution" and the word "contentious" omitted. An explanation is added to make it clear when the pendency of a suit or proceeding shall be deemed to commence and

when it shall be deemed to end. Collusive suits are excluded as they are not really suits at all, but merely a pretence. Further to attract the doctrine of *lis pendens* the suit must be pending in a court of competent jurisdiction and this has been made clear in the explanation.

Clause 12.—The section has been remodelled. The first paragraph of the old section referred both to transfers made with intent to defraud creditors and to transfers made in fraud of other transferees. It is desirable to split the section into two parts, sub-section (1) referring to creditors and sub-section (2) to other transferees, on the lines of the English law of Property Act, 1925. This division eliminates two difficulties in the construction of the present section. The first difficulty is that paragraph 3 can hardly apply to a case of contest between a prior voluntary transfer and a subsequent transfer for consideration. The second difficulty is in the use of the words "may be presumed" in the second paragraph which are being interpreted in different ways in the two cases. This inconsistency has been removed by the division of the section into two parts and the inclusion of a special provision in the last paragraph of the second sub-section for cases of conflict between a transfer without consideration and a subsequent transfer with consideration.

Paragraph 2 of present section 53 lays down a rule of evidence which has also given rise to considerable difficulty in interpretation. The general trend of decisions was that the court should decide in each case whether on all the circumstances the intention of the transferor was to defraud, defeat or delay his creditors and this is also the course of legislation. It is therefore proposed to delete para 2 of section 53 and to have the determination of the question of intent to be dealt with according to the ordinary rules of evidence.

The reference to prior 'transferees and co-owners or other persons having an interest' is superfluous as it is not clear in what cases they can be defeated by a subsequent voluntary transfer. The corresponding words have therefore been omitted.

It has been provided that the law of insolvency shall not be affected. To protect the transferee from being exposed to a multiplicity of suits, it is desirable to provide that a suit by a creditor must be a representative suit on behalf of all the creditors, and accordingly paragraph 3 has been inserted in sub-section (1).

Clause 13.—Courts have been applying the equitable doctrine of part performance to cases of transfer which have not been validated by registration on the ground that when one party has executed his part of the agreement in the confidence that the other party would do the same, it would be inequitable and a fraud, if the latter should refuse, to suffer this refusal to work to the prejudice of the former. Ignorant transferees in the country who have partly performed the contract require some measure of protection. Statutory recognition is therefore given by this clause to the doctrine of part performance. At the same time certain safeguards as mentioned below are provided in order that the law of registration may not be evaded and that the introduction of the doctrine does not lead to perjuries and frauds which it is the object of the doctrine to prevent.

(1) It is provided that the agreement should be in writing.

(2) The transferee should take possession of the property or if already in possession should, in addition to continuing in possession, do some act in furtherance of the contract.

(3) The transferor is debarred from enforcing against a transferee any right except such as are expressly provided by the contract. The mutual covenants will be operative though no title has passed. This will necessitate the completion of the transfer according to law by execution and registration in order that the transferee may get a marketable title. Thus the law of registration will not be evaded.

(4) There is a further safeguard in that the equities arising out of part performance may not affect the rights of a transferee for value without notice. It would be necessary therefore for the first transferee to have his transfer perfected according to law by registration and thereby acquire an indefeasible title.

Clause 14.—The expression "material defect" in section 55 (1) (a) has been held to include a defect in the title of the seller. Statutory effect is given to this decision by inserting the words "as in the seller's title thereto."

In sub-clause (b) of clause (4) of the same section, the unpaid seller's charge available against the buyer is made enforceable not only against the buyer but against a

transferee from the buyer with notice of the non-payment or a gratuitous transferee, as such lien could otherwise have been defeated by the buyer parting with the property. This clause is also silent as to the date from which interest on the unpaid purchase money should run. It is but fair that interest should run from the date when the buyer is put in possession.

Sub-clause (b) of clause (6) of the same section provides that a buyer's lien for price prepaid can be enforced against the seller and other persons claiming under him with notice of the payment. Gratuitous transferees and legal representatives of the seller could escape liability by pleading that they had no notice. It is proposed to amend the clause by omitting the words "with notice of the payment" so as to permit of the buyer's lien for price prepaid being enforced against all persons claiming under the seller.

Clause 15.—Section 56 as amended provides for the right of marshalling being enforced not only against the seller but also against the mortgagee of the seller.

Clause 16.—It is very often difficult to distinguish a mortgage by conditional sale from sales with a condition of repurchase. The nature of the transaction can only be determined by finding out the intention of the parties. In order to avoid the difficulty it is desirable to lay down a statutory test by which the intention is to be gathered. A proviso is added to clause (c) of section 58 to the effect that no transaction shall be deemed to be a mortgage by conditional sale unless the condition is embodied in the document purporting to effect the sale.

In sub-clause (*d*) it is made clear that a case where a mortgagee who is entitled to possession but has not received possession or a case where the mortgagee is entitled to appropriate a portion only of the income is a usufructuary mortgage. The definition of a mortgage by deposit of title deeds which is now in section 59 and the definition of an anomalous mortgage which is now in section 98 are brought under Section 58 which contains the definitions of the several kinds of mortgages. The term Bank has been extended so as to include foreign Banks working in Mysore to enable them also to deal in mortgages by deposit of title deeds.

Clause 17.—These amendments are consequential on the transfer of the definition of a mortgage by deposit of title deeds to section 58.

Clause 18.—This makes it clear that the words "mortgagor" and "mortgagee" include all persons deriving title under them.

Clause 19.—The word "payable" gave rise to a diversity of opinion and it was held in some cases that a mortgagor could redeem before the period stipulated for redemption. The contrary view which is the better one is that the mortgagor cannot redeem before the mortgage money has become due. In order to remove the doubt, the word "due" has been substituted for the word "payable."

It is also made clear that on redemption a mortgagee should deliver not only the mortgage deed but all documents in his possession relating to the mortgage. The word "decree" has been substituted for the word "order" as the old practice of passing orders absolute has been abolished. By the addition of the word "only" in the last paragraph, it is made clear that the case mentioned therein is the only exception to the rule of the indivisibility of a mortgage.

Clause 20.—Provision is made to require the mortgagee at the instance of the mortgagor to assign the mortgage to a third person. New section 60-B recognises the right of the mortgagor to inspect and take copies of the documents of title in the possession of the mortgagee.

Clause 21.—The wording of the section has been recast so as to make it clear that it is left to the option of the mortgagor to redeem any one or more of the mortgages.

Clause 22.—These amendments are in consonance with the amendments to sections 60 and 58 (*d*).

Clause 23.—Provides for cases where the mortgage deed is silent as to the rate of interest.

Clause 24.—Since there is no express provision in the Regulation dealing with improvements to the mortgaged property, this section has been added. The mortgagee will be entitled to compensation when the improvements are made to preserve the property from deterioration or to prevent the security from becoming insufficient. Provision is made for a mortgagee in possession to remove fixtures as a lessee can do.

Clause 27.—In the absence of an express provision in the Regulation, the question is raised whether the mortgagor in possession is competent to grant a lease of

the mortgaged property during the continuance of the mortgage and whether such a lease is binding on the mortgagee. It is therefore proposed to expressly provide that the mortgagor shall, subject to the express conditions of the mortgage deed, be entitled to grant a lease of the mortgaged property. Certain restrictions are however imposed to safeguard the interests of the mortgagee.

Clause 28.—It is desirable that the drastic remedy of foreclosure is used only in exceptional cases. It is therefore proposed to confine the remedy to the case of a mortgagee by conditional sale or of a mortgagee under an anomalous mortgage whereby the express terms of which the parties have stipulated for foreclosure, and to disallow it in other cases.

Clause 29.—When a mortgagee holds several mortgages in respect of the same or different properties, it will be prejudicial to the mortgagor if the mortgagee is allowed to enforce one mortgage and keep the other mortgages alive. The principle of consolidation is proposed to be applied to the mortgagee and he should enforce all the mortgages or none at all unless there is a contract to the contrary.

Clause 30.—The section has been recast so as to remove certain doubts that had arisen. The personal remedy declared by section 68 is additional to the remedies provided in section 67 and this concurrent remedy sometimes leads to abuse. It is therefore proposed to provide that in clauses (*a*) and (*b*) of sub-section (1) the mortgagee should exhaust all his available remedies against the mortgaged property before he seeks to pursue the personal remedy against the mortgagor unless the mortgagee abandons his security.

Clause 32.—It is equitable that a mortgagee though not in possession should be entitled to spend such money as may be necessary for the purposes mentioned in section 72.

The purpose in clause (*a*) is transferred to section 76 (*h*) which relates to a mortgagee in possession.

Clause 33.—The new section extends to cases of sale for arrears of other charges of a public nature and of acquisition under the Land Acquisition Regulation. The word "charge" is also avoided as it relates to immovable property and is enforceable as a simple mortgage. The mortgagee will be entitled to claim payment out of the

surplus fund or compensation money. Provision is also made for priorities.

Clause 34.—Sections 74 and 75 are deleted and the incidents therein which are based on the principle of subrogation are embodied in new sections 92 and 94.

Clause 36.—The principle of tacking embodied in section 80 is transferred to section 93 to come after 'subrogation.'

Clause 37.—The change is merely verbal.

Clause 38.—The principle of contribution is made applicable by this amendment to cases where the mortgaged property is subsequently divided into distinct and separate portions held in severalty. It further fixes the date of the mortgage as the date at which the valuation for the purpose of contribution should be made.

Clause 39.—Provision is made requiring the mortgagee to file all documents of title and also a draft reconveyance or an acknowledgment before he is entitled to draw the money.

Clause 40.—A proviso has been added making it clear that where the mortgagor has deposited the amount without a previous tender and has subsequently withdrawn it, interest shall be payable from date of withdrawal. It is not reasonable that the mortgagor should withdraw the money and at the same time get the benefit of cessation of interest.

Clause 41.—Section 91 has been remodelled omitting what is considered superfluous and combining the clauses where suitable. An attachment does not create an interest and there is no reason why an attaching creditor should have the right of redemption.

Clause 42.—Sections 74 and 75 have been omitted and the principle of subrogation is provided for in the new section 92 and applied to all persons having an interest in the mortgaged property, *i.e.*, all those referred to in section 91 as having the right of redemption. The section gives a full and extended expression to the doctrine of subrogation. 'A person advancing money for redeeming a mortgage is given the right of subrogation, but it is provided that the payment should however have been made under an agreement to subrogate reduced to writing and registered.

As the principle of tacking is closely allied to that of subrogation, section 80 is renumbered as 93 and placed after section 92.

Section 94 provides for the doctrine of foreclosing down which was partly contained in section 75.

Clause 44.—As there is no clear provision regarding the rights and liabilities of parties to a mortgage by deposit of title deeds, section 96 has been added.

Clause 45.—There has been a doubt whether a charge can be enforced against a transferee for consideration without notice. It is made clear that it cannot be enforced against such transferees.

Clause 46.—It may generally be taken to be the intention of a creditor and to his benefit to keep his own incumbrances as well those which he has paid off alive. The section is accordingly amended.

Clause 48.—Service by post is a recognised mode of service, and provision is made for serving a notice by post.

Clause 49.—Since a lease contains covenants both on the part of the lessor and the lessee, it is desirable that it should be executed by both.

Clause 52.—There is no provision now for relief against forfeiture where it accrues on breach of an express condition which provides that on breach thereof the lessor may re-enter although the breach may be capable of easy remedy. It is desirable that such a provision should be introduced here.

Clause 53.—The section is widened in its scope. It provides for the rights of the transferee also. It is also provided that the party can get back the thing transferred only if it is still in the possession of the other party.

Clause 56.—In this clause the provisions of the bill which are not to have retrospective operation are specified.

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No. 2826—*L. C., Bangalore dated 9th December* 1937.

Under Rule 8 of the rules for the conduct of business of the Mysore Legislative Council, the accompanying Bill to supplement the Transfer of Property (Amendment) Regulation is published for general information with the statement of objects and reasons.

By Order,

A. SUNDARARAJA RAO,

Secretary,

Mysore Legislative Council.